

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:MAN:TL-N-930-00

JJSweeney

date:

to: Chief Examination Division, Manhattan District
Attn: Daniel Altman, CEP Case Manager, Team 1103

from: District Counsel, Manhattan District, New York

subject: Taxpayer: [REDACTED] (U.I.L. #6501.08-10)
EIN: [REDACTED]
Taxable Years: [REDACTED] through [REDACTED] (Form 1120F Returns)

PROPER PARTY TO SIGN FORM 872 AFTER MERGER

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This memorandum responds to your request of June 9, 2000 for written advice concerning the appropriate language for a Form 872, Consent to Extend the Statute of Limitations on Assessment, ("Form 872") in connection with the Form 1120F income tax returns of [REDACTED] for its [REDACTED] through [REDACTED] tax years. This request was made in light of the purported merger under French law of [REDACTED] and [REDACTED].

In brief, we conclude the Form 872 to be issued should be addressed as follows: "[REDACTED] ([REDACTED]), formerly known as [REDACTED] ([REDACTED])". This conclusion is subject to our other recommendations made herein, which should be read in full before preparing the Form 872.

Facts

██████████ ("██████") filed a Form 1120F, Federal Income Tax Return of a Foreign Corporation, for each of the ██████ through ██████ taxable years. ██████ was a foreign ██████ organization registered as a limited company in Paris, France. It operated a portion of its ██████ functions for those years through ██████ situated in the United States. Being a foreign corporation, ██████ was not part of a consolidated return group for these years.

The Examination Division of the Manhattan District is currently examining these Form 1120F returns. Each of the taxable years ██████ through ██████ remain open for assessment under I.R.C. § 6501(c)(4) based on a Form 872 previously executed by ██████ on ██████. The period for assessment for these years currently expires on December 31, ██████.

On ██████, ██████ and ██████, also a ██████ organization registered as a limited company in Paris, France, purportedly executed a Merger Agreement ("the Agreement") under the laws of France¹. This merger culminated from several transactions in which ██████ acquired all of the common stock of ██████. (Agreement, para. 1(c)). In this merger, ██████ emerged as the surviving corporation; the separate existence of ██████ ceased. (Id., recitals, section V, Dissolution of ██████). All of the assets of ██████, including those located outside of France, became vested in ██████. (Id., para. 4). ██████ assumed all of ██████'s outstanding liabilities, including those liabilities incurred by ██████ outside of France and dividends to ██████'s stockholders to be paid for the December 31, ██████ year. (Id., paras. 3 and 4). Also upon the merger, ██████ adopted the name "██████████". (Id., para. 1(A)(a)). In connection with this name change, ██████ has represented to you that its EIN for U.S. tax purposes is the same EIN as for ██████.

The issue is whether ██████ is the proper party to execute a Form 872 to extend the period for assessing tax for the ██████ through ██████ tax years of ██████. If so, it must then be determined how ██████ should be described on the "name" line of the Form 872.

¹ We reviewed an unexecuted version of this merger agreement. For purposes of this memorandum, we assume that this agreement was executed on ██████, the date identified thereon. ██████, (b)(5)(DP), (b)(7)a ██████
██████████
██████████

Law and Analysis

As the statute of limitations on assessment for the [REDACTED] through [REDACTED] tax years of [REDACTED] was previously extended until December 31, [REDACTED], an additional Form 872 can be secured to further extend the statute of limitations on assessment for those years. I.R.C. § 6501(c)(4). For this purpose, [REDACTED] is the proper party to execute the Form 872 if it bears primary liability for the debts of [REDACTED]. [REDACTED] was the surviving corporation in the merger with [REDACTED]. It changed its name to [REDACTED] upon the merger. Thus, with respect to [REDACTED], the language of a Form 872 should be treated as a situation in which a corporation has undertaken a mere change in name. Gator Oil Company v. Commissioner, 66 T.C. 145 (1976).

In Gator Oil, the petitioner changed its name by amending its by-laws and by filing its name change with Florida, its state of incorporation. The Court determined that under Florida law this name change had no effect on the petitioner's continuing liability for debts incurred before its change in name. The principle from this case applicable here is that when an entity changes its name, relevant local law should determine the extent to which the name change has any impact on the entity's liability for debts incurred before its change in name.

In this case, the merger agreement specified that [REDACTED] was to assume all of the liabilities of [REDACTED]. It did not specifically state that [REDACTED] would assume its own liabilities, presumably because that fact was obvious from the context of this transaction. Thus, it is reasonable to conclude that under the agreement [REDACTED] continued to bear its obligations even after changing its name to [REDACTED], and that French law would so require.

Accordingly, [REDACTED] is the party to execute the Form 872, with the follow language "[REDACTED] ([REDACTED]), formerly know as [REDACTED] ([REDACTED])".

, (b)(5)(DP), (b)(7)a



[REDACTED], (b)(5)(DP), (b)(7)a

We also recommend that you verify the EIN of [REDACTED], if you have not done so previously. If any EIN change has occurred, such EIN should replace the EIN for [REDACTED] identified in our above-recommended language for the Form 872.

[REDACTED], (b)(5)(DP), (b)(7)a

Furthermore, Section 3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. § 6501(c)(4)(B), requires the Service to advise taxpayers of their right to refuse to extend the statute of limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Service requests that the taxpayer extend the limitations period. To satisfy this requirement, you may provide Publication 1035, "Extending the Tax Assessment Period," to the taxpayer when you solicit the Form 872. Alternatively, you may advise the taxpayer orally or in some other written form of the I.R.C. § 6501(c)(4)(B) requirement. In any event, you should document these actions in the case file.

Finally, we further recommend that you pay strict attention

² [REDACTED], (b)(5)(DP), (b)(7)a

to the rules set forth in the IRM. Specifically, IRM 4541.1(2) requires use of Letter 907(DO) to solicit the Form 872, and IRM 4541.1(8) requires use of Letter 929(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letters should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the responsible manager should promptly sign and date it in accordance with Treas. Reg. § 301.6501(c)-1(d) and IRM 4541.5(2). The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the event a Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

If you have any questions concerning the advice provided in this memorandum, please contact John Sweeney at (212) 264-1595, ext. 263. We will retain our files for this case to provide further assistance.

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